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No. 08-660

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
IRWIN EISENSTEIN

v.

CITY OF NEW YORK, NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Under Federal Rule of Appellate Procedure 4(a)(1)(A), a notice of appeal in a federal civil action generally must be filed within 30 days after the entry of the judgment or order from which the appeal is taken. If the United States is a "party" to the suit, however, Rule 4(a)(1)(B) provides that the notice of appeal may be filed within 60 days after entry of the relevant judgment or order. The question presented is as follows:

Whether, when the government declines to intervene or otherwise actively participate in a *qui tam* action under the False Claims Act, the United States is a "party" to the suit for purposes of Rule 4(a)(1)(B).

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INTEREST OF THE UNITED STATES

This case involves a *qui tam* suit under the False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq*. The FCA is the primary mechanism by which the federal government recoups losses suffered through fraud, and the determination whether the government is a "party" to a *qui tam* action in which it has declined to intervene or otherwise actively participate may affect the nature of the government's obligations in such suits. The United States therefore has a substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. As amended, the FCA imposes civil liability upon "[a]ny person" who, *inter alia*, "knowingly presents, or

causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). A person who is found to have violated the FCA is liable for civil penalties "plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. 3729(a).

An action under the FCA may be commenced in either of two ways. First, the government itself may bring a civil action against the alleged false claimant. 31 U.S.C. 3730(a). Second, a private person (known as a relator) may bring a *qui tam* civil action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). In that event, "[t]he action shall be brought in the name of the Government." *Ibid.*

If a relator brings a *qui tam* action, the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). The complaint "shall not be served on the defendant until the court so orders," *ibid.*, and "[t]he defendant shall not be required to respond to any complaint filed under [Section 3730] until 20 days after the complaint is unsealed and served upon the defendant," 31 U.S.C. 3730(b)(3). In addition to filing the complaint under seal, the relator must serve a copy of the complaint and any supporting evidence on the government. 31 U.S.C. 3730(b)(2).

Within 60 days after receiving the complaint and supporting evidence, the government may elect either "to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), or to "notify the court that it declines to take over the action," 31 U.S.C. 3730(b)(4). The 60-day period may be extended "for good cause shown" on motion by the government. 31 U.S.C. 3730(b)(3). If the government elects to intervene, it "shall have the primary re-

sponsibility for prosecuting the action, and shall not be bound" by any act of the relator. 31 U.S.C. 3730(c)(1). The relator may continue as a party to the action, *ibid.*, however, and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, 31 U.S.C. 3730(c)(2)(A)-(B). If the government declines to intervene, the relator has the exclusive right to conduct the action. See 31 U.S.C. 3730(b)(4)(B), (b)(5), and (c)(3).

If the government intervenes and the suit ultimately produces a monetary recovery, the relator is generally entitled to between 15 and 25 percent of the proceeds. 31 U.S.C. 3730(d)(1). If the government declines to intervene and the relator successfully prosecutes the action, the relator receives between 25 and 30 percent of the recovery. 31 U.S.C. 3730(d)(2).

2. Federal Rule of Appellate Procedure 4(a) establishes the deadlines for filing a notice of appeal in a federal civil action. Under Rule 4(a)(1)(A), the notice of appeal generally must be filed within 30 days after the entry of the judgment or order from which the appeal is taken. "When the United States or its officer or agency is a party" to the suit, however, "the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(B). The timing requirements set forth in Rule 4(a)(1)(A) and (B) largely track the provisions of 28 U.S.C. 2107(a) and (b).

3. This case involves a *qui tam* suit filed by petitioner Irwin Eisenstein against respondents, the City of New York and Michael Bloomberg. Petitioner alleged that respondents had violated federal and state law by requiring non-resident City employees to pay a fee equivalent to the municipal income taxes paid by resi-

dent City employees. J.A. 27-31. Petitioner asserted that imposition of the fee on non-resident City employees violated the FCA because those employees are able to deduct the fee as an expense for federal income tax purposes, thereby depriving the federal government of tax revenue. J.A. 38, 41-42.

As required by the FCA, see 31 U.S.C. 3730(b)(2), petitioner's complaint was filed under seal and was not served upon respondents. J.A. 1. The United States declined to intervene to take over the action, J.A. 46, but requested service of all pleadings and reserved its rights to order any deposition transcripts and to move to intervene for good cause at a later date, J.A. 47. After declining to intervene, the United States had no involvement in the case at any point before the district court.

Petitioner's complaint was unsealed and served on respondents. J.A. 1-2, 49-50. Respondents subsequently moved to dismiss the complaint for failure to state a claim. J.A. 3. On March 30, 2006, the district court granted respondents' motion to dismiss. Pet. App. 16a-43a. On April 12, 2006, the district court entered judgment in respondents' favor. J.A. 5. On June 5, 2006, 54 days after the entry of judgment, petitioner filed his notice of appeal. J.A. 6, 51-55.

4. a. The court of appeals *sua sponte* ordered the parties to brief whether the 30-day time limit in Federal Rule of Appellate Procedure 4(a)(1)(A) or the 60-day time limit in Rule 4(a)(1)(B) "applies to a *qui tam* action where the United States declines to intervene in the proceedings." J.A. 57. Petitioner and respondents filed briefs on that issue, at which time respondents also moved to dismiss the appeal in part for lack of jurisdiction. J.A. 11-12. The court of appeals subsequently appointed counsel for petitioner, J.A. 14, and the parties

then submitted additional briefs addressing both the motion to dismiss and the merits of the appeal, J.A. 16-18. At that point, the United States filed a brief as amicus curiae in support of respondents' motion to dismiss, without addressing the merits of the appeal. J.A. 18.

b. The court of appeals granted respondents' motion to dismiss the appeal. Pet. App. 1a-15a. The court held that "the United States is not a 'party' * * * for the purposes of the deadline for filing a notice of appeal" when it "fails to intervene or to raise or resist any legal claim." *Id.* at 7a. The court rejected petitioner's argument that, because the government is a real party in interest to a declined *qui tam* suit, it is a "party" to such an action within the meaning of Federal Rule of Appellate Procedure 4(a)(1)(B). *Id.* at 8a-10a. The court also explained that the 60-day filing period under Rule 4(a)(1)(B) serves to accommodate the government's internal processes for deciding whether an appeal should be taken in cases where it is a potential appellant, and the court found that rationale to be inapplicable to the present case. *Id.* at 10a-11a. While acknowledging that other circuits had reached a contrary conclusion, the court "d[id] not agree that a 'literal' reading of Rule 4(a) accords a 60-day filing period to private individuals who bring suit in the name of the United States." *Id.* at 13a-14a. The court was also unpersuaded that its reading of Rule 4(a) was likely to produce confusion among attorneys responsible for filing notices of appeal in similar cases in the future. *Id.* at 14a.

SUMMARY OF ARGUMENT

1. a. The United States is typically not a party to a *qui tam* action for purposes of Rule 4(a)(1)(B) where, as here, it declines to intervene. Intervention is the standard mechanism by which a nonparty becomes a party to a civil action. The FCA authorizes the government either to intervene in a *qui tam* suit or to decline to do so. The statute thus indicates both that the mere filing of a *qui tam* suit is insufficient to make the government a party to the action and that the government should be allowed to choose whether it will become a party. Congress's reliance on the ordinary understanding of intervention is confirmed by other aspects of the FCA's text and history.

b. Although intervention is the usual means by which the government becomes a party to a *qui tam* suit, the government may also become a party by exercising certain rights expressly granted by the FCA to direct the disposition of the litigation over the relator's objection. In this case, however, the government did not exercise those prerogatives or actively participate in any way during the district court proceedings. This case therefore does not present the question under precisely what circumstances the United States may decline to intervene in a *qui tam* suit yet nevertheless become a party for purposes of Rule 4(a)(1)(B) through subsequent participation before the district court.

2. a. Contrary to petitioner's contention, the purposes of Rule 4(a)(1)(B) are not implicated here. The reason for allowing 60 days to appeal when the government is a party is that its institutional decisionmaking processes take more time than those of private litigants. The government does not conduct those processes in *qui*

tam suits in which it has neither intervened nor exercised its statutory rights to direct the litigation.

b. The status of the United States as a real party in interest in a declined *qui tam* suit is likewise insufficient to make it a "party" within the meaning of Rule 4(a)(1)(B). Petitioner brought this action as the partial assignee of the government's damages claim. Both petitioner and the government are therefore real parties in interest, and either could have brought suit to enforce the claim. The government did not bring the action, however, and it neither intervened nor actively participated before the district court. Petitioner therefore is the only party-plaintiff to this action, even though the government's entitlement to the bulk of any recovery gives it a practical stake in the outcome of the suit.

c. Petitioner is also incorrect in arguing that, because a *qui tam* suit is required to be brought in the name of the government, the United States is a "party" to the case within the meaning of Rule 4(a)(1)(B). Captions are not determinative of party status. In any event, petitioner's caption identifies the government not as a party-plaintiff but as an entity on whose behalf the action is brought. And whatever the probative value of the FCA's naming requirement, it is outweighed by competing inferences from the remainder of the FCA.

d. Finally, petitioner is incorrect in contending that the need for clarity favors a 60-day filing period. If this Court concludes that the relevant FCA provisions are better read not to make the United States a "party" to this declined *qui tam* action within the meaning of Rule 4(a)(1)(B), it will resolve any ambiguity that now exists, and future litigants will note and follow the Court's decision. That is particularly so because relators may not litigate *pro se* under the FCA.

ARGUMENT

I. THE UNITED STATES IS NOT A "PARTY" TO THIS CASE WITHIN THE MEANING OF FEDERAL RULE OF APPELLATE PROCEDURE 4(a)(1)(B) BECAUSE THE GOVERNMENT DECLINED TO INTERVENE AND DID NOT OTHERWISE ACTIVELY PARTICIPATE BEFORE THE DISTRICT COURT

Under 28 U.S.C. 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a federal civil case generally must be filed within 30 days after the judgment or order from which the appeal is taken. When the United States or a federal officer or agency is a "party" to the case, however, the time limit for all parties to file a notice of appeal is 60 days rather than 30 days. See 28 U.S.C. 2107(b); Fed. R. App. P. 4(a)(1)(B). Neither Section 2107 nor Rule 4 defines the term "party" for purposes of those provisions. For that reason, in determining party status for appellate purposes, this Court has looked to whether and how the putative party participated in the action before the district court. See, *e.g.*, *Lance* v. *Dennis*, 546 U.S. 459, 465 (2006) (per curiam); *Devlin* v. *Scardelletti*, 536 U.S. 1, 8-9 (2002); *Marino* v. *Ortiz*, 484 U.S. 301, 303-304 (1988) (per curiam).

Those decisions make clear that a nonparty may become a party to a civil action in one of two ways: (i) by invoking formal procedural mechanisms like intervention, substitution, or third-party practice, see, *e.g.*, *Marino*, 484 U.S. at 303-304 (nonparties who objected to settlement but did not intervene could not appeal); or (ii) by participating in the action in a manner and to a degree that justifies treatment as a party, see, *e.g.*, *Devlin*, 536 U.S. at 10-11 (nonnamed class members who

objected to settlement but did not intervene could nevertheless appeal).

When the government exercises its right under the FCA to intervene and assume control of a *qui tam* action, it acquires the status of a "party" to the suit for purposes of, *inter alia*, 28 U.S.C. 2107(b) and Rule 4(a)(1)(B). Even without formal intervention, the government may in rare circumstances become a party to a declined *qui tam* action by asserting particular rights under the FCA to direct the disposition of the suit. But where, as here, the government neither intervenes in a *qui tam* suit nor otherwise actively participates in the proceedings before the district court, it is not a "party" for purposes of Section 2107(b) and Rule 4(a)(1)(B).

A. Where, As Here, The United States Elects Not To Intervene In A *Qui Tam* Suit Brought Under The FCA, It Generally Declines To Assume Both The Rights And Obligations Of Party Status

1. The Federal Rules of Civil Procedure establish various procedural mechanisms by which a nonparty can become a party to a civil action. The most commonly used of those mechanisms is intervention under Federal Rule of Civil Procedure 24. The purpose of intervention is to allow a nonparty to a civil action to come into the action as a party and participate as such alongside the original parties. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987) ("One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice."); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1901, at 257 (3d ed. 2007) (*Wright*) (defining "[i]ntervention" as "a procedure by which an outsider with an interest in a

lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants").

Intervention under the FCA serves a similar purpose. When a relator brings a *qui tam* action, he must file the complaint under seal and refrain from serving it upon the defendant for at least 60 days. 31 U.S.C 3730(b)(2). The relator also must serve a copy of the complaint and any supporting evidence on the government. *Ibid.* At that point, the government "may elect to intervene and proceed with the action" before the complaint is unsealed and served upon the defendant. *Ibid.* Although the government may move to extend the time during which the complaint remains under seal, 31 U.S.C. 3730(b)(3), "[b]efore the expiration of the 60-day period or any extensions" it must make a choice: either "proceed with the action, in which case the action shall be conducted by the Government," or "notify the court that it declines to take over the action, in which case the [relator] shall have the right to conduct the action," 31 U.S.C. 3730(b)(4)(A) and (B). Through the procedural mechanism of intervention, Congress gave the Executive an option in FCA actions: intervene as a party-plaintiff and direct the litigation, or remain as a nonparty and allow the relator to conduct the suit.

The government's ability to choose whether to intervene in particular *qui tam* actions is crucial to ensure that such suits do not impose unmanageable burdens on federal personnel. If the United States were treated as a "party" to all *qui tam* suits for purposes of the Federal Rules generally, the government would be subject to substantial litigation burdens, most notably the requirements governing party discovery imposed by Federal Rules of Civil Procedure 26-37, simply as a result of private relators' decisions to initiate *qui tam* actions. The

FCA provisions governing intervention by the United States ensure that federal attorneys can decide, in each *qui tam* suit, whether the United States will assume the combination of advantages and disadvantages that party status entails.[1]

2. Because intervention is the typical process by which a nonparty becomes a party to a lawsuit, the FCA's authorization for the government "to intervene" in a *qui tam* action, 31 U.S.C. 3730(b)(2) and (c)(3), would be superfluous if the government were already a party to the suit. The FCA's intervention provisions thus demonstrate that the mere filing of a *qui tam* action is not sufficient to vest the United States with party status. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."). The inference that Congress employed the word "intervene" in its usual sense is particularly strong because that word is a legal term of art with an established legal meaning. See Fed. R. Civ. P. 24. "[W]here Congress borrows terms of art" with an established legal meaning, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."

[1] For purposes of the discovery obligations imposed by the Federal Rules of Civil Procedure, the government's decision whether to intervene in an FCA *qui tam* suit is not an all-or-nothing choice. Relators often file *qui tam* complaints that assert multifarious claims, sometimes against a number of defendants. In those circumstances, the government sometimes intervenes to take over the conduct of the suit only with respect to some claims or some defendants, leaving the remaining claims to be prosecuted by the relator. When the government elects that option, it is properly regarded as a "party" for discovery purposes only with respect to the claims as to which it has assumed control over the litigation.

Morissette v. *United States*, 342 U.S. 246, 263 (1952); *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't. of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring).

The history of the FCA confirms that Congress employed the term "intervene" in its customary and usual sense. As originally enacted in 1863, the FCA did not permit the government to assume control of the relator's action. See FCA, ch. 67, 12 Stat. 696; *United States* v. *Griswold*, 30 F. 762 (C.C.D. Or. 1887). That was true even though then, as now, the relator brought suit "for himself as for the United States" and the suit was required to be brought "in the name of the United States." FCA, Rev. Stat. § 3491 (1878). Once a relator commenced his action, the government was powerless to interfere with its prosecution, *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 546-547 (1943), although the government's consent was a prerequisite to dismissal of the suit, Rev. Stat. § 3491 (1878).

To increase the government's level of control over FCA litigation, Congress amended the Act in 1943 to provide that "[t]he Government may proceed with the action by entering an appearance by the 60th day after being notified" of the filing of the complaint. 31 U.S.C. 3730(b)(2) (1982). The amended statute provided that if the government "within said period shall enter appearance in such suit the same shall be carried on solely by the United States." 31 U.S.C. 232(C) (1976). If, however, the government either failed to enter an appearance or else entered but then failed to proceed, the relator could "carry on such suit." 31 U.S.C. 232(D) (1976). Either way, only one party could pursue the action: the government or the relator.

When it again amended the FCA in 1986, Congress substantially overhauled the Act's *qui tam* provisions. As explained above, the statute in its current form authorizes the government "to intervene and proceed with the action" at its outset, 31 U.S.C. 3730(b)(2), or "to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). Unlike the 1943 version of the statute, however, the FCA now allows the relator "to continue as a party to the action," 31 U.S.C. 3730(c)(1), even in cases in which the government has exercised its right to assume control over the litigation. Use of the term "intervene" in the current FCA is thus particularly apt because the government's participation as a party supplements, rather than displaces, the relator as a party to the action.

3. Congress's understanding of intervention as the typical process by which the government becomes a party to a *qui tam* action is confirmed by related provisions of law. See, *e.g.*, *Davis* v. *Michigan Dep't. of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Under the 1986 amendments to the FCA, even when the government elects not to intervene in a *qui tam* action, it may request to "be served with copies of all pleadings filed in the action." 31 U.S.C. 3730(c)(3). That provision would be superfluous if the government were already a party to the action, because Federal Rule of Civil Procedure 5 requires service on "every party [of] a pleading filed after the original complaint." Fed. R. Civ. P. 5(a)(1)(B); see Fed. R. Civ. P. 5(a) (1986) (requiring that "every pleading subsequent to the original complaint * * * be served upon each of the parties"). This Court ordinarily

attempts to avoid rendering statutory provisions superfluous, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001), and presumes that Congress is aware of the legal backdrop against which it acts, *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979).

Federal Rule of Civil Procedure 24, which governs intervention in civil actions generally, likewise presumes that putative intervenors are not already parties to the action. Rule 24(a), which governs intervention of right, allows intervention in certain circumstances only if "existing parties" do not adequately represent "the movant's * * * interest." Fed. R. Civ. P. 24(a)(2). And Rule 24(b), which governs permissive intervention, allows intervention only if it would not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Moreover, Rule 24(b) specifically permits a federal officer or agency to intervene only "if a party's claim or defense" is founded upon federal law administered by that officer or agency. Fed. R. Civ. P. 24(b)(2). Both mandatory and permissive intervention reflect the assumption that those who move to intervene in a pending case, including government officers and agencies, are not themselves parties to the action.

Petitioner contends that intervention is not a proper test of party status because, "even after declination, the Government's presence in a *qui tam* action is pervasive." Br. 19. That contention overstates the government's role. To be sure, the government has significant prerogatives under the FCA even after it has initially declined to intervene. Those include the right "to intervene at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3); the right to object to the relator's settlement and voluntary dismissal of the suit, see 31 U.S.C.

3730(b)(1); the right to dismiss a case over the relator's objection, see 31 U.S.C. 3730(c)(2)(A); and the right to seek a stay of the relator's discovery, see 31 U.S.C. 3730(c)(4). The government may also request the pleadings and deposition transcripts, see 31 U.S.C. 3730(c)(3), which ensures that federal personnel can monitor the suit in order to decide whether the government should exercise its other rights under the FCA.

Merely monitoring the pleadings and transcripts in an FCA case, however, is not the sort of active participation that is ordinarily associated with party status. And unless and until the government actually exercises its more substantive prerogatives in a particular case, their mere availability is likewise insufficient to make the United States a party to the suit. The statute's conferral of the rights described provides no sound reason to deprive the intervention decision of its ordinary effect. Those rights may indicate that "[t]he Government's role" in a declined *qui tam* action "is *sui generis*," Pet. Br. 27 n.17, but they do not transform a monitor into a participant or an observer into a party.

B. The FCA Allows The United States To Become A Party By Exercising Its Rights To Participate

1. For the reasons set forth above, when the government declines to intervene at the outset of a *qui tam* suit, and does not seek leave to intervene at a later stage, the usual inference is that the government has chosen to forgo the benefits and to avoid the burdens that party status would entail. This Court has recognized, however, that a nonparty may become a party to a civil action for at least some purposes by participating in a manner and to a degree that justifies treatment as a party, even when it does not invoke a formal proce-

dural mechanism like intervention. See *Devlin*, 536 U.S. at 10-11; *Blossom* v. *Milwaukee R.R.*, 68 U.S. (1 Wall.) 655 (1864).

The present case does not require the Court to apply that principle to the FCA context or to identify the precise circumstances under which the government might become a party to a declined *qui tam* action without formally intervening. See *Keene Corp.* v. *United States*, 508 U.S. 200, 212 n.6 (1993) ("Because the issue is not presented on the facts of this case, we need not decide [it]."). In this case, the government filed a standard notice that it had elected to decline intervention, J.A. 46-48, and it did not participate thereafter in the proceedings before the district court, J.A. 1-8. Thus, unless the Court agrees with petitioner's contention that the United States is a "party" to *every* declined *qui tam* action for purposes of Rule 4(a)(1)(B), the judgment of the court of appeals should be affirmed, since the government undertook no form of active participation here.

2. Although this Court need not decide what types of participation by the government in a declined *qui tam* action might warrant treatment as a party, it should not announce a categorical rule that intervention is the only means by which the government can become a party to such a case. In rare circumstances, the government can become a party to a declined *qui tam* action, even without formal intervention, by asserting its rights under the FCA to direct the disposition of the lawsuit. The FCA authorizes the government to dismiss a *qui tam* action notwithstanding the relator's objection, see 31 U.S.C. 3730(c)(2)(A), and to veto a proposed settlement and voluntary dismissal of the suit, 31 U.S.C. 3730(b)(1).

The statute does not make intervention a prerequisite to the exercise of those prerogatives.[2]

When it invokes those statutory powers, the government requests action from the district court that is adverse to the relator, indicating that the government is no longer content to accept the relator as its representative. In requesting such action, moreover, the government does not merely advise the district court as to the proper construction of applicable legal principles, but asserts statutory rights to direct the disposition of the litigation.[3] Contrary to petitioner's contention (Br. 28-

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[2] To be sure, nothing in the FCA *precludes* the government from intervening in a *qui tam* action when it seeks to dismiss the suit over the relator's objection or to veto a proposed settlement and voluntary dismissal. Once the government has made an initial election "not to proceed with the action," however, it has no unqualified *right* to intervene at a later stage of the case; rather, the district court may "permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). Because the government's authority to dismiss a *qui tam* action, see 31 U.S.C. 3730(c)(2)(A), or to veto a settlement and voluntary dismissal, see 31 U.S.C. 3730(b)(1), is not similarly contingent upon the permission of the district court, the structure of the FCA as a whole suggests that intervention is not a prerequisite to the exercise of those prerogatives. In addition, by authorizing the government "to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), the FCA suggests that the usual consequence of intervention is that the government will thereafter prosecute the suit.

[3] The government's status as a party in such circumstances may make no difference to the timeliness of an appeal. When the government asks the district court to grant or deny a motion to dismiss, 31 U.S.C. 3730(b)(1) and (c)(2)(A), or to approve a settlement, 31 U.S.C. 3730(c)(2)(B), appeal is generally taken from the collateral order resolving that issue (to which the government would be a party, see *Devlin*, 536 U.S. at 9-10; *id.* at 16-17 (Scalia, J., dissenting)), rather than from a judgment on the merits. A court therefore may never have reason to determine whether the government is a party when it exercises such statutory rights.

30), treating the government as a party in those two narrow circumstances, where the United States has sought to exercise an express statutory right to direct the disposition of a *qui tam* action over the relator's objection, would create no meaningful uncertainty concerning the application of Rule 4(a)(1)(B) to declined *qui tam* suits generally.[4]

3. That position is consistent with the government's appeal in *Searcy* v. *Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997). In *Searcy,* the government initially declined to intervene in a *qui tam* action, but subsequently objected to a proposed settlement between the relator and the defendant, see 31 U.S.C. 3730(b)(1), without first seeking leave to intervene for good cause, see 31 U.S.C. 3730(c)(3). *Searcy*, 117 F.3d at 155. The district court approved the settlement, and the government then sought to appeal. *Id*. at 155-156. In the Fifth Circuit, the relator contended that the government was not a proper appellant because it had not intervened at any point. *Id*. at 156.

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[4] When a nonparty to a lawsuit requests a ruling on a matter collateral to the merits of the litigation, he may be entitled to appeal a judicial order denying that request, even though he is not a party to the suit as a whole and would not be entitled to appeal a final judgment. See *Devlin*, 536 U.S. at 16-17 (Scalia, J., dissenting) (discussing cases); note 3, *supra*. Under the FCA, the government has certain statutory prerogatives that do not involve directing the disposition of the lawsuit, such as the authority to move to extend the time during which the relator's complaint remains under seal, based on a showing of "good cause." 31 U.S.C. 3730(b)(3). If the government's motion to extend time were denied on an improper ground, the government would be a party entitled to appeal that collateral order (assuming that order was otherwise appealable), but the mere filing of an extension request would not make the government a party to the underlying action or any eventual judgment on the merits.

In response, the government argued that it was entitled to appeal because it was the "real party in interest" and "the real plaintiff" in the suit. Gov't Br. at 13, *Searcy*, *supra* (No. 96-40515) (quoting *United States ex rel. Milam* v. *University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48 (4th Cir. 1992)). The government further suggested that the United States should be regarded as a party for purposes of appeal in declined *qui tam* cases generally. See *id.* at 13-15. Although that argument was overbroad, the government also contended, and the Fifth Circuit correctly held, that the government was entitled to appeal in the circumstances of that case because it had opposed the settlement in the district court, as the FCA expressly authorized it to do. *Id.* at 15-20; see *Searcy*, 117 F.3d at 157-158. The Fifth Circuit concluded that "the district court was mistaken in determining that the government has no veto power" over a proposed settlement of a declined *qui tam* suit, and that "the government should be able to correct that error by raising its veto power in an appeal to this court, even if it chooses not to intervene." *Id.* at 157. The decision in *Searcy* is thus consistent with the government's current view that, although some affirmative choice by the government is necessary for the United States to become a party to a *qui tam* action, the government can acquire party status by asserting specific statutory rights under the FCA as well as by formally intervening.

II. PETITIONER'S ARGUMENTS THAT THE UNITED STATES IS A PARTY UNDER RULE 4 EVEN WHEN IT DECLINES TO INTERVENE OR PARTICIPATE LACK MERIT

A. The Purpose Of Rule 4(a)(1)(B) Is Not Implicated When The United States Neither Intervenes Nor Participates In The Action

Petitioner and his amici do not contend (Pet. Br. 36 n.27; Taxpayers Against Fraud (TAF) Br. 14 n.12) that the United States is a party for all purposes to a declined *qui tam* action. Indeed, petitioner expressly (and correctly) disavows the contention that the United States is subject, in a declined *qui tam* suit, to the discovery obligations imposed upon parties to litigation by Federal Rules of Civil Procedure 26-37. See Pet. Br. 36 n.27. Rather, petitioner and his amici contend that the United States is a "party" to a declined *qui tam* action within the meaning of Rule 4(a)(1)(B) even if it is not for other purposes a "party" to such a suit. That argument is misconceived.

It is certainly true that one can be a "party" to a lawsuit for some purposes and not others. See *Devlin*, 536 U.S. at 9-10. And if the purposes underlying Rule 4(a)(1)(B)'s extended time limit were directly and substantially implicated by declined *qui tam* suits, it might be appropriate to treat the United States as a "party" to such actions within the meaning of Rule 4(a)(1)(B), even though the government is not a "party" to such suits under other provisions of law. In fact, however, the rationale for Rule 4(a)(1)(B)'s longer time limit in federal-party cases is wholly inapplicable here.

Rule 4(a)(1)(B) allows 60 days to file a notice of appeal when the government is a party because "the gov-

ernment's institutional decisionmaking practices require more time to decide whether to appeal." *United States ex rel. Russell* v. *Epic Healthcare Mgmt. Group*, 193 F.3d 304, 306 (5th Cir. 1999). That rationale is clear from the Advisory Committee Notes accompanying Rule 4(a)(1)(B)'s predecessor, which are entitled to "weight" in interpreting the Rule. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315-316 (1988); *Schiavone* v. *Fortune*, 477 U.S. 21, 30-31 (1986). In adopting the 60-day period, the Committee explained that, when the government is deciding whether to appeal, the affected agency or department must forward its recommendation to the relevant Assistant Attorney General in the Department of Justice, "who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion." Fed. R. Civ. P. 73 advisory committee's note (1946) (28 U.S.C. App. at 5200 (1958)). "If these departments are rushed," the Committee continued, "the result will be that an appeal is taken merely to preserve the right, or without adequate consideration." *Ibid.*

As the court of appeals recognized, "[that] rationale is obviously inapplicable to the present case, where the government has played no part in the underlying litigation other than to decline to participate in it." Pet. App. 11a. When the government neither intervenes nor actively participates before the district court, it does not conduct the formal institutional decisionmaking process, culminating in a decision by the Solicitor General, that is used to determine whether an adverse district court ruling should be appealed. To be sure, because appellate rulings in declined *qui tam* cases may announce broadly applicable legal principles that will affect the

future enforcement of the FCA, the government often monitors appeals in such cases to determine whether participation by the United States is warranted to protect the federal government's interests. When the government concludes that such participation is appropriate, however, its practice is to file a brief as amicus curiae rather than to assert that it possesses party status.[5]

Consistent with that understanding, the government filed a brief as amicus curiae before the court of appeals in this case. J.A. 18. Moreover, the government has repeatedly participated in such actions as an amicus curiae—not as a party—before this Court.[6] The government has even participated as an amicus curiae at this Court's invitation, see Gov't Cert. Amicus Br., *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (No. 95-1340), which suggests that this Court has not heretofore regarded the government as a party to declined *qui tam* actions.

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[5] See, *e.g.*, *United States ex rel. Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180 (10th Cir. 2008); *United States ex rel. Sanders* v. *Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006), vacated, 128 S. Ct. 2123 (2008); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350 (11th Cir. 2006); *United States ex rel. Hendow* v. *University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), cert. denied, 550 U.S. 903 (2007); *United States ex rel Totten* v. *Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), cert. denied, 544 U.S. 1032 (2005).

[6] See, *e.g.*, Gov't Amicus Br., *Allison Engine Co.* v. *United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) (No. 07-214); Gov't Amicus Br., *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005) (No. 04-169); Gov't Amicus Br., *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003) (No. 01-1572). By contrast, the government participated as a party in *Stevens* because it had intervened pursuant to 28 U.S.C. 2403(a) in order to defend the *qui tam* provisions of the FCA against constitutional challenge. See Gov't Br. at 8 n.6, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) (No. 98-1828).

B. The United States' Status As A Real Party In Interest Does Not Make It A Party To All *Qui Tam* Actions For Appellate Purposes

Petitioner contends (Br. 17-19) that the United States is a "party" to a declined *qui tam* suit within the meaning of Rule 4(a)(1)(B) because the government is a real party in interest to this action. Because the government receives the bulk of any monetary recovery in a *qui tam* suit even when it declines to intervene, petitioner is correct that the United States is a real party in interest to such actions. That fact, however, provides no basis for finding Rule 4(a)(1)(B) to be applicable here.

Petitioner's argument ignores the distinction between a "real party in interest" and a "party" to an action. Federal Rule of Civil Procedure 17(a) requires that "[a]n action must be prosecuted in the name of the real party in interest," which means "the person who, according to the governing substantive law, is entitled to enforce the right." 6A *Wright* § 1543, at 334 (2d ed. 1990). The term "real party in interest" therefore has a recognized and settled legal meaning, and omission of the term from Rule 4 "cannot be viewed as simply an oversight." Pet. App. 10a.

Moreover, those terms do have different meanings. As petitioner points out (Br. 18), he brought this action as "a partial assign[ee] of the Government's damages claim." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). In the case of a partial assignment, "the assignor and assignee each retain an interest in the claim and are both real parties in interest * * * and under Rule 17(a) either party may sue to protect his rights." 6A *Wright* § 1545, at 351-353 (2d ed. 1990). Petitioner cites no authority for the proposition that a real party in interest who

plays no active role in the litigation should be regarded as a "party" to the suit. Petitioner's attempt to equate the two concepts is particularly unavailing in the context of declined *qui tam* actions under the FCA. Although the government's entitlement to a share of any recovery gave it a tangible interest in the outcome of petitioner's suit, the United States expressly declined to exercise its statutory right to intervene and thereby become a party to the litigation.

C. The FCA's Requirement That A *Qui Tam* Suit Be Filed In The Name Of The Government Does Not Make The United States A Party To Such Actions For Appellate Purposes

Petitioner further argues (Br. 20-25) that the United States is a "party" to this suit within the meaning of Rule 4(a)(1)(B) because the action was required to be filed in the name of the government. That argument is incorrect for several reasons.

1. Petitioner asserts that "the United States remains a party to a *qui tam* action in a literal sense, *i.e.*, its name is on the caption." Br. 20 (quoting *Rodriguez* v. *Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 302 (3d Cir. 2009)). It is black-letter law, however, that "the caption is not determinative as to the identity of the parties to the action." 5A *Wright* § 1321, at 388 (3d ed. 2004); *United States* v. *99.66 Acres of Land*, 970 F.2d 651, 659 n.4 (9th Cir. 1992). In any event, the caption of petitioner's complaint does not identify the United States as a party-plaintiff. It identifies petitioner as the party-plaintiff and the United States as an entity for whose benefit the action is brought: "United States Ex Rel Irwin Eisenstein et al." J.A. 23. Because "bringing a claim on a person's behalf and having that person

bring the claim on his or her own are two very different things," *Williams* v. *Bradshaw*, 459 F.3d 846, 848 (8th Cir. 2006), the FCA's requirement that a *qui tam* suit be brought in the name of the United States does not indicate that the government is a party-plaintiff.[7]

That is equally true in other contexts, where the United States can be named in the caption even though it is clearly not a party aligned with the plaintiff. See, *e.g.*, *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) (state prisoner sought writ of habeas corpus against state warden); *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953) (same); *Ashe* v. *United States ex rel. Valotta*, 270 U.S. 424 (1926) (same); see also *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (alien sought writ of habeas corpus against federal officials).[8] Accordingly, while the FCA requires a

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[7] Contrary to petitioner's assertion (Br. 23-24 n.14), Federal Rule of Civil Procedure 10 adds nothing to the analysis. Although "[t]he title of the complaint must name all the parties," Fed. R. Civ. P. 10(a), it may also name nonparties for whose benefit the action is brought. Petitioner cites no authority for the proposition that one party-plaintiff may make another entity an additional party-plaintiff simply by naming it in the title of a complaint.

[8] One of petitioner's *amici* points (TAF Br. 10) to a pair of circuit court decisions holding that the government is a party to actions under the Miller Act, 40 U.S.C. 3133(b), which authorizes subcontractors to bring actions in the name of the United States. It is far from clear that those cases are rightly decided, given that none of the purposes of the 60-day filing period is implicated by the Act. See *Blanchard* v. *Terry & Wright, Inc.*, 331 F.2d 467, 469-470 (6th Cir.) (holding that "[t]he interest of the United States was merely nominal" under the Miller Act and that "[t]he use plaintiffs were the real parties in interest"), cert. denied, 379 U.S. 831 (1964). In any event, there is no reason to look to the seldom-litigated Miller Act in interpreting the oft-litigated FCA. That is particularly so because the Miller Act contains no analogue to

qui tam action to "be brought in the name of the Government," 31 U.S.C. 3730(b)(1), that does not itself make the government a party.

Nor does Federal Rule of Civil Procedure 17 add anything to the analysis. Rule 17(a)(1) requires that "[a]n action must be prosecuted in the name of the real party in interest," but a relator *is* a real party in interest. So far as Rule 17(a) is concerned, the relator could bring a *qui tam* action in its own name without also joining the United States as the entity for whose benefit the action was brought. The requirement that the government be named in the caption of a relator's complaint is imposed by the FCA, see 31 U.S.C. 3730(b)(1), not by Rule 17(a).

2. Petitioner contends (Br. 21, 23) that the FCA's naming requirement serves an important purpose: it binds the government to the judgment and precludes the government from litigating the same claims against the same defendant in a subsequent suit. It is well-settled, however, that a nonparty can be bound by a judgment and precluded from subsequent civil litigation in certain circumstances. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2172-2173 (2008) (discussing six exceptions to the rule against nonparty preclusion); *Devlin*, 536 U.S. at 18 (Scalia, J., dissenting) ("There are any number of persons who are not parties to a judgment yet are nonetheless bound by it."). For instance, "a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Taylor*, 128 S. Ct. at 2172 (brackets in original) (quoting *Richards* v. *Jefferson County*, 517

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the FCA provisions that allow the government to elect whether to "intervene" in a particular suit.

U.S. 793, 798 (1996)). Accordingly, the government can be bound by the judgment in a *qui tam* action even when it elects not to become a party, but instead allows the relator to litigate on its behalf.

3. Finally, even assuming that the FCA's naming requirement might otherwise suggest that the government has party status in a declined *qui tam* suit, that inference is overridden by the clear import of the FCA's text and history taken as a whole. Most importantly, the United States had a statutory right to "intervene" in this case and elected not to exercise that right. The FCA's intervention provisions make clear both that the mere filing of a *qui tam* complaint does not make the government a party to the suit at its outset and that the choice whether to become a party is left to the United States. See pp. 9-15, *supra*. This Court should not conclude that Congress, through the oblique method of requiring the government to be named in the caption, mandated that the United States be treated as a party to this suit notwithstanding its express declination to intervene and its subsequent failure to play any active role in the litigation.

D. The Need For Clarity Does Not Make The United States A Party To All *Qui Tam* Actions For Appellate Purposes

Petitioner contends that "[o]nly a holding in favor of the 60-day deadline will eliminate confusion" among FCA litigants. Br. 25. That concern is misplaced and should not dictate this Court's interpretation of Rule 4.

1. Petitioner contends (Br. 27) that "a literal reading of the rules militates in favor of the 60-day period." But while Rule 4(a)(1)(B) specifies one consequence that follows when the United States is determined to be a party to a lawsuit, it sheds no light on *whether* the Uni-

ted States is a party to a declined *qui tam* action. If the provisions of law germane to that question are better read to indicate that the United States is not a "party" in these circumstances, there is no basis for this Court to adopt a different interpretation simply because some litigants might misunderstand the law. Petitioner's argument logically suggests that, whenever any timing requirement is plausibly susceptible of different interpretations, courts should adopt the most generous (rather than the most persuasive) reading of that requirement. Petitioner cites no authority to support that approach.

In any event, the Court's decision in this case will provide a clear rule going forward as to the applicable deadline for filing a notice of appeal in these circumstances. Petitioner contends (Br. 26) that "there will be a trap for the unwary or a likelihood of confusion even following a holding by this Court in favor of the 30-day rule." That argument is based on petitioner's supposition that, because the FCA requires the government to be named in the caption of a *qui tam* complaint, reasonable litigants will not perceive the kind of ambiguity as to the notice-of-appeal deadline that would alert them to the need for further research. Of course, if this Court agrees with petitioner that the FCA's naming requirement unambiguously manifests Congress's intent to treat the United States as a "party" to a declined *qui tam* suit, the Court will presumably find Rule 4(a)(1)(B) applicable here without regard to the likelihood that a contrary ruling would sow confusion. But if the Court finds that inference to be unwarranted, there is no basis for assuming that future litigants will draw it. This Court's decisions on matter such as filing deadlines are

not so inconsequential as petitioner's argument suggests.

2. It is noteworthy is this regard that the courts of appeals have thus far uniformly held that relators may not litigate *pro se* under the FCA. See *United States ex rel. Mergent Servs.* v. *Flaherty*, 540 F.3d 89, 92-94 (2d Cir. 2008); *Timson* v. *Sampson*, 518 F.3d 870, 873-874 (11th Cir.) (per curiam), cert. denied, 129 S. Ct. 74 (2008); *Stoner* v. *Santa Clara County Office of Educ.*, 502 F.3d 1116, 1127 (9th Cir. 2007), cert. denied, 128 S. Ct. 1728, and 129 S. Ct. 46 (2008); *United States ex rel. Brooks* v. *Lockheed Martin Corp.*, 237 Fed. Appx. 802, 803 (4th Cir. 2007) (per curiam); *United States ex rel. Lu* v. *Ou*, 368 F.3d 773, 775-776 (7th Cir. 2004); *United States* v. *Onan*, 190 F.2d 1, 6-7 (8th Cir.), cert. denied, 342 U.S. 869 (1951).[9] Petitioner's argument thus depends on the prediction that relators' *counsel* will continue to be confused as to the applicable deadline for filing a notice of appeal, "even following a holding by this Court in favor of the 30-day rule." Pet. Br. 26.

That seems unlikely, particularly because the 30-day time limit that the court of appeals found applicable here is not an unusually truncated period for filing a notice of appeals, but is the deadline that governs federal civil actions generally. See Fed. R. App. P. 4(a)(1)(A). Moreover, "filing a notice of appeal is a purely ministerial

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[9] Petitioner was proceeding *pro se* at the time that he filed his notice of appeal. The court of appeals ultimately requested supplemental briefing on two issues: (i) whether petitioner's notice of appeal was timely and (ii) whether petitioner was entitled to proceed *pro se*. J.A. 11-12. The court appointed counsel for petitioner only for the purpose of briefing those issues. J.A. 14. Because the court dismissed the appeal as untimely, it did not reach the issue of whether petitioner could proceed *pro se*.

task," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000), that can be readily accomplished by relators' counsel within the 30-day filing period. Because petitioner failed to file his notice of appeal within the time prescribed by Federal Rule of Appellate Procedure 4(a)(1)(B), the court of appeals correctly held that his appeal was untimely.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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